

### **REMARKS**

Claims 1-13 and 25-35 remain pending in the present application. Claims 25-35 have been added in the present office action response. Claims 14-24 are canceled.

#### **35 U.S.C. § 103 Rejections**

The Examiner has rejected Claims 1-13 under 35 U.S.C. § 103(a) as being obvious over Evers in view of Comulada *et al.* Assignee's attorney respectfully traverses this ground of rejection.

Assignee's attorney has amended Claim 1 to positively recite a bat. The prior art of record fails to teach or otherwise suggest a bat in combination with the leveling devices. Since the bat is positively recited, the Examiner's assertion that such recitation is merely functional is moot.

Moreover, the Assignee's attorney asserts that the Examiner has utilized non-analogous art in making this rejection. The Comulada *et al.* reference teaches a device related to circuits and leveling of a **substrate** as discussed in the first sentence of the summary of the invention section at col.2, ll. 60-63. In addition, the Examiner has cited Evers which is also related to leveling of circuit type **substrates**. As the Examiner may be aware, substrates are generally recognized as flat surfaces. One skilled in the art would realize that such structure does not meet the generally understood shape of a bat barrel. Thus, the Examiner has failed to cite any prior art which teaches or otherwise remotely suggests such a leveling device for use with a baseball bat and the Examiner should also realize that the recited structure would need to be changed to operate in a manner claimed by the Applicant. MPEP 2143.01 states [i]f a proposed

modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. See also *In Re Gorman*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

Assignees attorney has also added Claims 25-35 which also claim automatic leveling devices. In addition these claims also positively recite a bat, which is not taught or suggested in the cited prior art.

Regarding the Examiner's intended use argument, such point is now moot since the bat is positively recited.

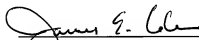
For these reasons, Assignee's attorney respectfully requests the Examiner to provide a notice of allowance and expedite this case to issuance.

#### **CONCLUSION**

Assignee's attorney believes that the instant application is now in condition for allowance and therefore respectfully requests that the Examiner allow the pending claims. However, if the Examiner believes there are other unresolved issues in this case, Assignee's attorney would appreciate the courtesy of a telephone call at (502) 584-1135 to discuss such remaining issues.

Respectfully submitted,

**MIDDLETON REUTLINGER**

  
James E. Cole, Reg. No. 50,530  
2500 Brown & Williamson Tower  
Louisville, KY 40202  
(502) 608-2746 direct dial  
(502) 561-0442 fax  
[jcole@middreut.com](mailto:jcole@middreut.com)